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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

OPTIONS FOR YOUTH-BURBANK, INC., et al., Plaintiffs and Appellants, v. EDUCATION AUDIT APPEALS PANEL et al., Defendants and Respondents.	B285790 (Los Angeles County Super. Ct. No. BS148496)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

Young, Minney & Corr, Paul C. Minney, Lisa A. Corr, Kevin M. Troy; Blaxter Blackman and Steven H. Winick for Plaintiffs and Appellants.

Xavier Becerra, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Leslie P. McElroy and Tara L. Newman, Deputy Attorneys General, for Defendants and Respondents.

This appeal has its origins in an emergency audit of six Options for Youth (OFY) and three Options for Learning (OFL) non-classroom based charter schools (appellants). The audit resulted in a conclusion that the schools had been overfunded by about $34 million over a period of four years, due in large part to their methodology for calculating the number of full-time equivalent (FTE) certificated teachers in their programs. Appellants compared the contractually required instructional hours of their full time certificated independent study teachers (7 hours per day for 240 days = 1680 hours per year) to the contractually required instructional hours of a full-time certificated classroom teacher in the Los Angeles Unified School District (LAUSD) (5 hours per day for 175 days = 875 hours per year). As a result, appellants counted each of their full-time teachers as a 1.92 FTE teacher (1680/875 = 1.92).

Appellants appealed the audit findings and recommendations to the Education Audit Appeals Panel (EAAP). Following a hearing by an assigned administrative law judge (ALJ), EAAP issued its Final Decision affirming the audit findings. Appellants then filed a petition for writ of administrative mandamus in the superior court. The trial court denied the petition and entered judgment against appellants. This appeal followed.

Appellants contend EAAP abused its discretion in (1) affirming the audit findings when the audit report did not in fact

contain findings; (2) requiring appellants to demonstrate express legal authority for their FTE methodology; (3) finding appellants could not lawfully use an FTE greater than 1.0 for their full-time teachers; (4) applying a version of California Code of Regulations, title 5, section 11704 (regulation) promulgated after the time frame covered by the audit; and (5) failing to consider whether appellants had inadvertently not complied with the appropriate methodology. Appellants also contend the trial court abused its discretion when it denied them leave to file a second amended petition. We affirm the judgment.

BACKGROUND

California law permits both traditional public schools and charter schools to offer independent study programs as an alternative instructional strategy. Independent study students generally do not attend classes daily. They usually meet with their teachers at intervals during the school year. Thus, independent study programs account for student attendance using a different methodology than do traditional classroom programs. Generally, teachers assign attendance credit for each student based on the teacher's evaluation of whether the student has met the assigned instructional requirements for his or her independent study. Independent study programs are required to meet the same instructional minute requirements as classroom based schools.

Appellants offer only independent study programs. They focus primarily on "academic recovery programs."[1] These

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[1] Appellants also offered home study programs. During the audit years, OFY had 26 academic recovery programs and three home study programs, while OFL had 24 academic recovery programs and five home study programs.

programs allow students to choose their own core and elective courses and to control the pace of their learning. The schools assign each student to a teacher at one of their centers; the students meet with their teachers twice a week for one hour per visit.

Even though charter schools enjoy a significant degree of operational flexibility and freedom to innovate (see Ed. Code, § 47601, subds. (c) & (f).),[2] they must comply with some of the same requirements as district schools. In 1999, the Legislature passed Assembly Bill No. 434 (AB 434) requiring non-classroom based charter schools to comply with Article 5.5 of the Education Code and any implementing regulations. (§ 47612.5, subd. (b).) Article 5.5 sets out requirements for independent study programs in district schools.

For district schools, former section 51745.6, subdivision (a), specifies that the required pupil to teacher ratio for independent study programs in a school district "shall not exceed the equivalent ratio of pupils to full-time certificated employees for all other educational programs operated by the . . . school district." Following the passage of AB 434, the State Board of Education promulgated regulation 11704, explaining the application of section 51745.6 to independent study programs in charter schools: for such programs, a charter school's pupil to-teacher ratio (PTR) " 'shall not exceed the equivalent ratio of pupils to full-time certificated employees for all other educational programs operated by the largest unified school district . . . in the

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[2] Further undesignated statutory references are to the Education Code.

county or counties in which the charter school operates.' " (Italics and underline omitted.)

PTR is a term used to describe the ratio of average daily attendance (ADA) to FTE certificated teachers. In a classroom-based school, a pupil who attends school each day for the reporting period generates a 1.0 ADA. The higher a school's ADA, the greater the amount of funds a school is eligible to receive from the state. Regulation 11700 defines "FTE certificated employees" as "any combination of full-time certificated employees and part-time certificated employee assignments that aggregate to the amount of instructional time specified in the contract of a full-time certificated classroom teacher of the district or county office of education." (*Id*., subd. (a).) Regulation 11700.1 provides that "district" means "a school district or a charter school, unless the context clearly indicates otherwise." (*Id*., subd. (c).)

In 2001, the Legislature passed Senate Bill No. 740 (SB 740) which directed and authorized the State Board of Education to establish criteria to evaluate funding requests from charter schools offering non-classroom based instruction, and to determine the total amount of funding each such charter school should receive. Under the newly established criteria, the number of FTE certificated teachers employed by a charter school became significant. Charter schools could not receive any funding unless they spent a specified portion of their revenue on certificated teachers (or instruction). A charter school was also required to meet minimum PTRs.

In 2005, the California Department of Education (CDE) became concerned about appellants' finances and operations and commissioned an extraordinary audit of appellants. The audits

were conducted by the Fiscal Crisis Management Assistance Team and MGT of America, Inc. During the course of the audit, it became apparent that the CDE and appellants had different opinions about the methodology to be used to calculate FTE. Appellants filed a lawsuit in Los Angeles Superior Court seeking a determination of the correct methodology. (Case No. BC347454)

On August 9, 2006, the auditor issued an Extraordinary Audit Report (Audit Report) for school years 2002-2003, 2003-2004 and 2004-2005; on April 11, 2007, the auditor issued a "Follow-Up Audit" for school year 2001-2002. Appellants' lawsuit was still pending at that time.[3]

Chapter 4 of the Audit Report discusses charter school PTRs. Much of this chapter is devoted to the "methodology for determining full-time equivalent certificated teachers." The Audit Report states in pertinent part: "the three charter-holding entities all utilize a formula whereby a full-time teaching assignment at their schools results in a 1.92 FTE for the purpose of calculating the pupil-to-teacher ratios for funding apportionment. The OFY and OFL management contended that the teachers of the three charter-holding entities work more days and hours than a 'typical' teacher due to their year-round calendar and longer school day . . . .[4] To determine whether the

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[3] A few months later, in June 2007, the superior court sustained the CDE's demurrer to appellants second amended complaint without leave to amend on the ground appellants had failed to exhaust their administrative remedies.

[4] There is no explanation in the audit why appellants set their full-time contract hours at almost double the "typical" hours for a full-time teacher in LAUSD (which appellants treat as

1.92 methodology is permissible under existing laws and regulations, the audit team sought a legal opinion from CDE's attorneys. The CDE's attorney opined that the 1.92 methodology does not comply with existing laws and regulations and that the charters should claim their teachers on a 1.0 FTE scale. [¶] In response to this finding, [appellants] sought their own legal opinion."

Appellants filed a notice of appeal from the findings and recommendations of the Audit Report, while at the same time contending that the Audit Report did not make any findings on the issue of FTE methodology.

EAAP assigned an ALJ to the matter; the ALJ held a full administrative hearing. The ALJ's proposed decision determined appellants had miscalculated the FTE of their teachers for 2001-2002, 2002-2003, 2003-2004 and 2004-2005. In March 2014, EAAP adopted the proposed decision of the ALJ and upheld the Audit Report findings that appellants had been overpaid by about $34 million.

Appellants brought a petition for writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5 against EAAP; the CDE, the State Board of Education, the California Department of Finance, and the State Controller's Office were the real parties in interest.

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typical). While appellants' centers offer longer hours and more days than a LAUSD classroom school, appellants' students engage in independent study. There is no apparent reason why each teacher needs to be present every hour and day the center is open. Two teachers working LAUSD hours could split the coverage and qualify as one full-time (FTE) teacher and one .92 FTE teacher.

In August 2017, the trial court denied the writ petition, finding no abuse of discretion by EAAP in reaching its decision. This appeal followed.

STANDARD OF REVIEW

In a petition for writ of administrative mandamus, the trial court's inquiry "shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).)

When a trial court reviews an administrative determination by a board which has fact-finding powers, "the court must 'exercise its independent judgment on the facts, as well as on the law . . . .' " (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811 (*Fukuda*).) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Id.* at p. 817.)

When the trial court has exercised its independent judgment, "we review the record to determine whether the court's factual findings are supported by substantial evidence, resolving all evidentiary conflicts and drawing all legitimate and reasonable inferences in favor of the court's decision. (*Fukuda, supra,* 20 Cal.4th at p. 824 ['Even when, as here, the trial court is required to review an administrative decision under the

independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test.']; *Bixby v. Pierno* [(1971)] 4 Cal.3d 130, 143, fn. 10 ['After the trial court has exercised its independent judgment upon the weight of the evidence, an appellate court need only review the record to determine whether the trial court's findings are supported by substantial evidence.'].)" (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 627 (*Cassidy*).)

DISCUSSION

I. The Audit Report Contains Findings On The Permissible FTE Methodology

Appellants contend EAAP abused its discretion in ruling that it was affirming audit findings concerning FTE methodology because the Audit Report did not contain any such findings. In effect, appellants are claiming EAAP found, without support, that the audit team itself had made a finding concerning appellants' FTE methodology. (See Code Civ. Proc., § 1094.5, subd. (b) [abuse of discretion occurs when findings are not supported by the evidence].) Appellants also contend the trial court made "a finding on this point, which must be reviewed here on the substantial evidence standard."

In its ruling on appellants' petition for writ of mandate, the superior court acknowledged appellants' claim that the Audit Report made no findings but explained: "Whether the auditor phrased its conclusions as findings or recommendations is not dispositive. The audit identified the conflict in methodologies for determining FTE as exemplified in the two contrasting legal opinions obtained by Petitioners and Respondent, and analyzed outcomes based on the different methodologies. (See AR 12987, Conclusion 80; see AR 1766-1768 [discussing excess funds using

1.0 FTE instead of 1.92 FTE].) The ALJ and EAAP treated this analysis as a finding and proceeded to consider the appeal. (AR 12987.)"[5] The court added: "Moreover, the Audit findings at issue were clearly based on an assumption that a 1.0 FTE should have been used instead of a 1.92 FTE. (AR 1766-1768.)" The court pointed out that the CDE legal opinion was requested by the auditor.

Reviewing the trial court's determination for substantial evidence (see *Cassidy, supra,* 220 Cal.App.4th at p. 627), we determine such evidence supports the trial court's determination that the auditor made a finding that the 1.92 FTE should not have been used (and by extension EAAP's finding that the auditor made such a finding). The Audit Report itself states: "To determine whether the 1.92 methodology is permissible under existing laws and regulations, the audit team sought a legal opinion from CDE's attorneys. The CDE's attorney opined that

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[5] This reference appears to be to Paragraph 76 of EAAP's decision, in which it concludes that appellants "failed to establish that the Findings and Determinations set forth in the [Audit Report] and the Follow-Up Audit Report were based on factual errors or misinterpretations of law." We note that EAAP began its discussion of Chapter 4 of the Audit Report (which discusses FTE) by stating: "The [Audit Report] sets forth that Appellants OFY and OFL used unlawful practices and methods to calculate the number of FTE certificated teachers. . . . More specifically, Chapter 4 of the [Audit Report] states that as a result of OFL's and OFY's improper use of an FTE of 1.92, rather than the appropriate FTE of 1.0, Appellants OFY and OFL were overpaid . . . ." Although EAAP did not use the term "finding" in this paragraph, EAAP signaled the end of its discussion on this topic by stating "With respect to other [Audit Report] Chapter 4 findings . . . ."

the 1.92 methodology does not comply with existing laws and regulations and that the charters should claim their teachers on a 1.0 FTE scale. [¶] In response to this *finding*, OFY and OFL sought their own legal opinion." (Emphasis added.) This language shows the auditor unmistakably, although indirectly, adopted the CDE legal opinion as part of its findings.

Appellants maintain the auditor took a neutral position on methodology because the auditor's recommendations state: "To determine the proper methodology for calculating FTE," OFY, OFL and CDE should "seek a swift resolution of the FTE-related legal action" or "attempt to establish a common understanding . . . regarding the rules for calculating FTE."

Appellants are inferring the auditor's neutrality on appropriate methodology from these statements. On appeal, we draw all reasonable inferences from the evidence in favor of the trial court's ruling. (See *Cassidy, supra,* 220 Cal.App.4th at p. 627.)

We do not infer neutrality from these statements. It is reasonable to infer from the quoted recommendations that the auditor was aware the lawsuit was still pending when the Audit Report was issued and recognized that the issue of appropriate methodology was *now* before the courts to decide. Appellants' own selected quotations of the audit team's comments support this inference. The audit team explained: " 'The report states that [Appellants] "may" have been overpaid . . . because the issue is currently before the courts' to decide.' " The audit team also noted the issue of the appropriate FTE " 'is now a legal matter before the courts.' " As for the auditor's recommendations of a "swift resolution" of the lawsuit or a settlement of the dispute, it

is reasonable to infer that the auditor recognized that a protracted dispute was not in anyone's interest.

Appellants alternatively focus on the "contingent" nature of the recommendations, and contend they cannot be a finding because under Government Auditing Standards, a finding must identify "criteria," which are the rules, regulations, standards, norms, and other benchmarks against which performance is compared or evaluated. By "contingent," appellants mean that the auditor referred broadly to the law in both the CDE legal opinion and appellants' counsel's legal opinion without clearly identifying which law was applicable.

Using audit terminology, the auditor initially identified the CDE legal opinion (necessarily including the laws and regulations therein) as the criteria for assessing the lawfulness of appellants' behavior. Appellants offered their own legal opinion in response. Appellants' conduct at the time demonstrates they understood the audit team was using the CDE legal opinion as its criteria to assess the lawfulness of appellants' conduct and on that basis found the use of a 1.92 FTE impermissible: that is the reason they filed a lawsuit.

II. EAAP Did Not Place An Improper Burden Of Proof On Appellants.

Appellants contend EAAP abused its discretion by failing to proceed according to law when it required appellants to demonstrate express authority for an FTE greater than 1.0 to keep its funding. In appellants' view, because the state entities sought to recoup funding from appellants the state could only recoup funding if the state could prove that the law required appellants to claim an FTE of 1.0 for all their full-time teachers or forbade them from claiming an FTE greater than 1.0 for a

single teacher. Appellants contend that such express requirements were not found in any law during the audit years and so appellants were free to adopt any reasonable methodology.

Appellants point to section 41344 to support their claim that the state had to prove the 1.92 FTE was forbidden or 1.0 FTE required. Subdivision (a) of that section provides for repayment of received funds "that did not comply with statutory or regulatory requirements that were conditions of the apportionments." Subdivision (a)(1) provides that in calculating the amount of funds to be recouped, the state shall determine the amount of funds "that did not comply with one or more statutory or regulatory requirements that are conditions of apportionment." They conclude that these provisions of the Education Code permit the state to require charter schools to repay funds which the school received as a result of the school's failure to comply with "affirmative requirements" upon which apportionment of the funds was expressly conditioned. We will assume for the sake of argument that appellants are correct about this affirmative legal requirement.

We consider EAAP's statements on FTE methodology in both their procedural and substantive contexts. We do not agree that EAAP put the burden on appellants to provide authority for their methodology, or that EAAP found there was no law limiting appellants to a 1.0 FTE.

Procedurally, EAAP was considering an appeal by appellants of an audit finding against them. Subdivision (d) of section 41344 provides: "a hearing shall be held at which the local educational agency may present evidence or arguments if the local educational agency believes that the final report contains any finding that was based on errors of fact or

interpretation of law, or if the local educational agency believes in good faith that it was in substantial compliance with all legal requirements." Thus, as EAAP correctly stated near the beginning of its decision, it was appellants' burden to show that the audit findings were erroneous.

As we explain above, the audit incorporated the CDE legal opinion into its finding that appellants' 1.92 FTE methodology did not comply with existing law. That opinion reads regulations 11700 and 11700.1 together to require the use of the instructional hours specified in the charter schools' contract with their independent study program full-time teachers as the base for determining the charter school's FTE. Thus, the legal opinion does identify an "affirmative requirement" with which the charter schools were required to comply: count each of their independent study program full-time teachers as 1.0 FTE.

It was appellants' burden on appeal to show that the audit's interpretation of the methodology was erroneous. Appellants did in fact argue that this interpretation of the law was erroneous. Among their arguments was the claim that regulation 11700 permitted them to base their FTE calculations on the instructional hours of full-time classroom teachers in LAUSD, which they claimed amounted to 875 hours per year (5 hours per day for 175 days.) In appellants' view, this was express authority for a 1.92 FTE.

Appellants point to EAAP's statement that " '[R]egulation 11700 does not state that an FTE can be greater than one' " and " '[t]here is nothing in [regulation 11704] that allows a charter school to claim an FTE greater than one for a full-time teacher' " to show that EAAP "did *not* conclude that . . . [appellants'] 1.92 FTE violated a statutory or regulatory requirement." In

appellants' view, these statements show EAAP believed there was an absence of express authority authorizing a FTE greater than 1.0, and this absence meant appellants were limited to a 1.0 FTE.

This is not a reasonable interpretation of those statements, which are a small part of a three-paragraph explanation of how and why EAAP concluded that regulations 11700 and 11704 together with section 45024 limited an independent study charter school to an FTE of 1.0 even if their teachers were required to work more than a full-time classroom teacher in LAUSD or more than their mandatory minimum. EAAP clearly found that under the statutory definition of FTE in regulations 11700 and 11704 FTE could not exceed 1.0; EAAP also found appellants could not "expand the definition" by their own contractual agreement with their teachers.

Appellants also point to a third EAAP statement that appellants " 'did not establish that they are entitled to claim more than one FTE for each full-time certificated teacher who teaches at their independent study charter school.' " In context, this concluding statement is most reasonably understood as indicating that appellants had not met their burden of showing error in the Audit Report's interpretation of law.

III. Appellants' 1.92 FTE Methodology Is Not Legally Permissible.

Appellants next turn to the substantive issue of what methodology the statutory and regulatory scheme permitted them to use to calculate FTE at the time of the audits. Appellants contend their methodology was "expressly allowed by Education Code section 47610" and was in fact the most

conservative method for the audit period because it was the most consistent with the statutory and regulatory framework.

Interpretation of statute or regulation presents a question of law that we review de novo. (*Woodland Park Management, LLC v. City of East Palo Alto Rent Stabilization Bd.* (2010) 181 Cal.App.4th 915, 919–920.) Nevertheless, deference should be given to an agency's interpretation of a regulation where " 'the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.' " (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) EAAP is such an entity. (See § 41344.1.)

Section 47610 provides: "A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts" with a few exceptions not relevant here, such as building codes. Appellants argue that "if statutory authority for using an FTE over 1.0 during the Audited Years is required, Education Code section 47610 itself provides that affirmative authority. No law forbade Appellants from using an FTE greater than 1.0, and Appellants' charters did not forbid them from using an FTE greater than 1.0. Therefore, under a plain language interpretation [of] Education Code section 47610, Appellants were permitted to use an FTE over 1.0 – unless an auditor can

cite to a provision of law that proscribes the charter school's actions."

Whatever the import of section 47610 is in other contexts, the law is clear that if appellants wish to receive state funding for their independent study programs, they must comply with the requirements of SB 740 and the regulations promulgated thereunder, including maintaining the required PTR. In fact, both sides agree that the FTE methodology for PTR is determined by regulation 11700, which provides definitions for independent study programs. They disagree on the methodology permitted by that regulation.

As we have noted above, regulation 11700, subdivision (a) provides: "Full-time equivalent certificated employees" means "any combination of full-time certificated employees and part-time certificated employee assignments that aggregate to the amount of instructional time specified in the contract of a full-time certificated classroom teacher of the district or county office of education."

Respondents argue that regulation 11700 must be read together with regulation 11700.1, which provides "additional" definitions for independent study programs. Subdivision (c) of regulation 11700.1 provides: " 'School district' or 'district,' for the purposes of this subchapter and of Article 5.5 (commencing with Section 51745) of Chapter 5 of Part 28 of the Education Code, means a school district or a charter school, unless the context clearly indicates otherwise." Respondents contend that "charter school" must be substituted for "district" in regulation 11700, subdivision (a). With this substitution, regulation 11700 would read "the amount of instructional time specified in the contract of a full-time certificated classroom teacher of the *charter school*

. . . ." Thus, in respondents' view, FTE is determined by the 1680 hours required by appellants' contracts. Since appellants' teachers work 1680 hours, they have a FTE of 1.0.

Appellants contend that substituting "charter school" for "district" in regulation 11700, subdivision (a) makes no sense, because they do not employ any "classroom" teachers. We agree that where, as here, a charter school provides only independent study, and does not employ any classroom teachers, it makes no sense to substitute charter school for district. In such a situation, the applicable contract is the contract of a full-time classroom teacher of the district. We note EAAP also indicated this was the applicable contract.

Using LAUSD contract hours as the "ceiling" for one unit of FTE, appellants contend that since their teachers are contractually required to work 1.92 times more hours than LAUSD teachers, appellants' teachers count as 1.92 FTE teachers. We see nothing in regulation 11700 to authorize such a calculation.

Regulation 11700, subdivision (a) defines FTE as "any combination" of full-time employees and part-time assignments which "aggregate" to the LAUSD instructional hours. FTE is thus defined as a sum of assignment hours which individually are less than the LAUSD hours.[6] We note EAAP stated that regulation 11700 sets forth assignments that would "aggregate" to the district contract hours, indicating EAAP's understating that total would equal the district contract hours.

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[6] Nothing in regulation 11700 appears to preclude combining assignments of less than 875 hours even when the total of the assignments aggregate to more than 875 hours.

A single full-time employee whose hours exceed the number of hours in a LAUSD classroom contract cannot be "combined" or "aggregated" with part-time assignments to reach the lower LAUSD number. Those hours would have to be "dis-aggregated" (that is, divided) to equal the LAUSD hours. Regulation 11700 could, but does not, provide such a division or "dis-aggregation" formula.[7] We note EAAP also found regulation 11700 did not provide for an FTE greater than 1.0.

In the absence of such a formula, there is no authority for counting a fulltime employee whose hours exceed the LAUSD hours as having an FTE of greater than one. There is no authority to perform any subtraction or division on full time employee hours, and the full-time employee must remain as an FTE of 1.0.

This is consistent with other provisions of law, which permit but do not fund, additional instruction to the same pupil by charter schools. Charter schools may offer additional days of instruction over 175, but ADA cannot exceed 1.0. Similarly, charter schools may offer more minutes of instruction, but ADA cannot exceed 1.0. We note EAAP similarly pointed to section 45024's provision that the board of a school may require full-time certificated teachers to work more than their specified minimum.

Appellants counter they presented evidence to EAAP which they claim supports their argument that the CDE contemplated

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[7] The simplest representation of this calculation is a division formula: 1680/875=1.92. Another way to calculate the FTE would be to treat the first 875 hours of a teachers work as a 1.0 FTE. The remaining 805 hours of the charter teacher's work would constitute .92 FTE (805/875=.92). Then these two figures would be added back together to equal 1.92 FTE.

an FTE of greater than 1.0. We find the evidence unpersuasive for this purpose. On appeal, appellants simply summarize the evidence and do so inaccurately in many instances. For example, the first item of evidence is described as a statement in the CDE's Independent Study Manual that "any reasonable means of arriving at full-time equivalent in a given district should suffice for audit purposes." That statement, however, is referring to equating part-time teacher's assignments on a fractional basis to that of regular teachers' time. Similarly, the CALSTRS page quoted by appellants seems to concern aggregating part-time assignments for retirement credit purposes. Most of the evidence lacks any context at all. For example, appellants cite to pages of data listing FTEs greater than 1.0 with no explanation of the data, including the methodology for calculating the FTE. Both the auditors and respondents' counsel indicated to EAAP that there might be methodologies other than appellants' methodology which could permissibly be used to arrive at an FTE greater than 1.0. The proposed revision to regulation 11704 cited by appellants, for example, suggests that a teacher might have a FTE greater than 1.0 if the teacher worked more time than the standard for the job. More importantly, none of this evidence shows the understanding of persons or entities who were involved in the enactment of SB 740 or the promulgation of regulations in effect during the audit years.[8]

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[8] Respondents did offer both testimony and a declaration from Gregory Geeting, who was "directly responsible for the development and eventual submission of proposed regulations of S.B. 740." As summarized in EAAP decision, Mr. Geeting took the position that appellants' FTE of 1.92 was improper and that a FTE of 1.0 was appropriate. Neither party has provided record

IV. EAAP Relied On An Inapplicable Version Of Regulation 11704

Appellants contend that EAAP committed an abuse of discretion when it failed to proceed in a manner required by law and considered a version of regulation 11704 which had not yet been promulgated during the audit years. The trial court agreed that EAAP erred in relying on this version of the regulation, and we agree as well.

We review questions of law de novo, however, and we have not considered this version of the regulation in our analysis. There is thus no prejudice to appellants from this error.

V. Appellants Did Not Show Substantial Compliance With The Law.

Appellants contend EAAP failed to proceed in a manner required by law when it failed to consider whether appellants' noncompliance with the correct methodology was inadvertent. According to appellants, EAAP considered only whether the noncompliance was minor.

Appellants do not quarrel with EAAP's finding that their noncompliance was not minor. They contend, however, that section 41344.1, subdivision (c) provides that a "minor *or* inadvertent noncompliance may be grounds for a finding of substantial compliance" with legal requirements, and that their noncompliance was inadvertent. (Italics added.)

Appellants contend "inadvertent" means " 'not resulting from or achieved through deliberate planning.' " Appellants do not explain how their noncompliance was not the result of

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citations to Geeting's declaration or testimony, however, and we decline to search the 13,000 page administrative record for it.

deliberate planning. Appellants could have requested legal guidance concerning appropriate FTE methodology from their local school district or county board of education or from the State of California. Instead, they chose to rely on non-legal publications which did not discuss requirements or methods for calculating FTE, school district websites which simply posted FTEs for other schools without an explanation of the calculations involved, and similar sources. This is unmistakably an act of deliberate planning, and their choice of incorrect methodology is a result of that planning. EAAP did not abuse its discretion in failing to refute this self-evident incorrect claim that appellants' noncompliance was inadvertent.

VI. The Trial Court Did Not Abuse Its Discretion In Refusing To Allow Appellants To File A Second Amended Petition

Appellants contend the trial court abused its discretion in denying their motion to file a second amended petition because respondents did not claim or demonstrate prejudice.

Respondents contend the new causes of action in the proposed second amended petition were not valid causes of action. Leave to amend is properly denied when the facts are undisputed and as a substantive matter no liability exists under the plaintiff's new theory. (*Edwards v. Superior Court* (2001) 93 Cal.App.4th 172, 180.)

EAAP argued that the petition would add two parties who had never appealed to EAAP. EAAP also contended a new cause of action seeking a declaration EAAP's composition was unconstitutional should have been brought in a separate proceeding, was time-barred, and was waived by appellants' failure to raise the claim in the administrative hearing. (See

Toyota of Visalia, Inc. v. New Motor Vehicle Bd. (1987) 188 Cal.App.3d 872, 881 [as a general rule, a hearing on a writ of administrative mandamus is conducted solely on the record of the proceedings before the administrative agency].) In addition, EAAP claimed the cause of action involving repayment of funds was effectively moot. Respondents echoed EAAP's arguments and explained the cause of action concerning repayment plans were largely moot because the money owed by five of the seven schools had been recouped.

Appellants offer no response to these arguments. Accordingly, they have failed to demonstrate an abuse of discretion by the trial court.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.